JOSEPH MANIKAM

v.

TOPWIN DEVELOPMENT SDN. BHD. & ORS.

HIGH COURT MALAYA, KUALA LUMPUR
SITI NORMA YAAKOB J
[CIVIL SUIT NO. F 22-132-1986]
16 JANUARY 1987

LAND LAW: *Indefeasible title of chargee - Priority over purchaser's beneficial and equitable interest - Allegation of fraud - Effect - National Land Code - Section 304.*

CIVIL PROCEDURE: *Foreclosure proceedings - Application to remove private caveat - Whether caveat should be removed.*

The 2nd defendant is the registered owner of an undivided piece of property. He charged the property in favour of the 3rd defendant, a bank, as security for credit facilities which were extended to a firm of which the 2nd defendant was the sole proprietor. By a joint venture agreement between the 1st and the 2nd defendants, the property was developed into a housing estate and the 1st defendant offered housing lots for sale to the public. One of the purchasers was the plaintiff and to protect his interest, he lodged a private caveat over his lot but it was not clear when that caveat was registered.

The 2nd defendant then defaulted by failing to comply with a notice of demand issued by the 3rd defendant for all sums due under the credit facilities extended to the firm. The 3rd defendant proceeded to institute foreclosure proceedings but the plaintiff obtained an order *ex parte* against the 3rd defendant staying the auction. The present application was taken out by the 3rd defendant to have:

(i) The *ex parte* order staying the auction set aside;
(ii) the private caveat lodged by the plaintiff removed;
(iii) damages for wrongfully preventing it from proceeding with the auction;
(iv) costs incurred resulting from the abortive auction; and
(v) costs of the application.

It was not disputed that from the point of time, the charge was created before the execution of the sale and purchase agreement and before the lodgment of the private caveat by the plaintiff. The plaintiff's affidavit in reply in the present application alleged that the 3rd defendant had fraudulently foreclosed the property with the sole object of defeating his interests.

Held:

[1] Although the plaintiff had acquired a beneficial and an equitable interest over his lot, this is subject to the prior right of the 3rd defendant.

[2] As the chargee of the property, the 3rd defendant has an indefeasible title under s. 304 of the National Land Code and in the absence of fraud, no one can challenge its rights to exercise its power to auction the property to satisfy the amount due to it from the chargor.

[Application in terms prayed for allowed.]

Cases referred to:

Public Finance Bhd. v. Narayanasamy [1971] 2 MLJ 32
Kheng Soon Finance Bhd. v. M.K. Retnam Holdings Sdn. Bhd. & Ors. [1983] 2 MLJ 384

Legislation referred to:
National Land Code 1965, ss. 263, 304

For the 3rd defendant/applicant - Arunachalam (Tech with him); M/s. Manjit Singh Sachdev & Co.
For the plaintiff/respondent - Bachan Singh; M/s. Bachan & Kartar

JUDGMENT

Siti Norma Yaakob J:

The second defendant in this suit is the registered owner of an undivided piece of land held under LM. No. 10 Lot 1219, Mukim Ulu Kelang, Daerah Gombak, Kuala Lumpur, (the property). On 16 October 1980, he executed a charge over the property in favour of United Asian Bank Berhad, the third defendant, as security for credit, overdraft and other facilities up to an aggregate sum of RM100,000 which was extended to a firm known as Win Enterprise & Company of which the second defendant is the sole proprietor. This third party charge was registered on 3 November 1980.

By a joint venture agreement made between the second defendant and a housing developer, the first defendant, in which the second defendant is the managing director, the property was developed into a housing estate and the first defendant offered housing lots for sale to the public. One of those who purchased a lot was the plaintiff. He entered into an agreement with the first defendant on 4 April 1981 to purchase a housing lot measuring 7,600 sq. feet, free from any encumbrance, together with a house to be built on it for a consideration of RM38,000. He has already paid RM11,550 being the purchase price of his lot to the first defendant, leaving a balance of RM26,450 still due and owing under the sale and purchase agreement. To protect his interest, the plaintiff had also lodged a caveat over his lot but it is not clear from the pleadings when that caveat was registered.

In early 1984, the second defendant defaulted by failing to comply with a notice of demand issued by the third defendant for all sums due under the credit and overdraft facilities extended to Win Enterprise. As on 31 March 1984, the amount due for such facilities was RM143,801.53. The third defendant proceeded to institute foreclosure proceedings before the Collector who upon an enquiry, held on 19 December 1985, fixed 5 February 1986, as the date for the auction of the property under s. 263 of the National Land Code.

As the effect of such an auction will deprive the plaintiff of his right to his lot purchased under the sale and purchase agreement, the plaintiff, on 4 February 1986, filed this suit citing the developer, the first defendant, the registered owner, the second defendant, and the chargee, the third defendant, praying for a number of remedies and on the same day, obtained an order *ex parte* against the third defendant staying the auction scheduled for the next day.

This is followed by the present application by the third defendant to have

1. the order of stay dated 4 February 1986 set aside.
2. the private caveat lodged by the plaintiff removed.
3. damages for wrongfully preventing it from proceeding with the auction.
4. costs incurred resulting from the abortive auction.
5. costs of the application.

From the affidavits, it is not disputed that from the point of time, the third party charge was created before the execution of the sale and purchase agreement and before the lodgment of the private caveat by the plaintiff. Although the plaintiff has not pleaded or alluded to the

commission of any fraud by any party in the statement of claim, nonetheless in his affidavit in reply to this application, he has averred that with regard to his beneficial and equitable rights to his lot, the third defendant had fraudulently foreclosed the property with the sole object of defeating his interests. Particulars of such fraud appear more fully in para. 8(a)-(d) of his affidavit dated 19 May 1986.

The particulars as stated in para. 8(a) cannot be correct. To begin with, the credit facilities granted by the third defendant which were secured by the charge were for the benefit of a firm known as Win Enterprise & Company to which the second defendant is the sole proprietor. This is clearly borne out in Clause 1 of the annexure to the charge. The first defendant was not the beneficiary to the credit facilities granted by the third defendant and to that extent is in no way connected to the third defendant.

As for the particulars of fraud in para. 8(b), one would expect every purchaser of any property to exercise some prudence to see that the property sought to be bought is free from any encumbrance. A check with the Land Office is all that is required to satisfy a would-be purchaser that the property he is buying is in no way encumbered. In this case, the charge was registered on the 3 November 1980 and the plaintiff contracted with the first defendant 5 months later on 4 April 1981. The fact that the plaintiff was prepared to enter into a contractual relationship with the first defendant shows that the plaintiff had either not exercised due care to check as to the status of the property he was purchasing, in which case, he has only himself to blame for his own negligence, or being aware that the property was encumbered, still proceeded to purchase it, in which case, he buys his property subject to the charge.

Particulars of fraud in para. 8(c) of the plaintiff's affidavit refer to Clause 13 and 15 of the annexure to the charge and to the plaintiff's contention that the third defendant was notified by either the first or second defendant of the sale and purchase agreement, and that the third defendant had given its consent to the execution of such as agreement.

Clause 13 imposes a duty on the second defendant, the registered owner and chargor to provide all information to the third defendant relating to any transaction concerning the property. The purpose of this clause is quite obvious as a means of protecting the third defendant's interest as a chargee, which must be protected at all costs. In this case, the duty to inform lies strictly with the second defendant and has no relevance at all to the first defendant with whom the plaintiff had entered into agreement.

Clause 15 on the other hand, prevents the second defendant dealing with the property in any way unless a written consent approving such dealings has been obtained from the third defendant. Although the plaintiff had pleaded that the third defendant had given its written consent to the sale and purchase agreement, no such written consent was exhibited as proof that in fact it was given. Even if there was such a consent, it would only be given to the second defendant and not to the first defendant with whom the third defendant has no connection whatsoever.

As to the particulars of fraud pleaded in para. 8(d) of the plaintiff's affidavit, even if the third defendant was aware of the transaction between the plaintiff and the first defendant, it owes no duty or obligation to interfere in the affairs of the plaintiff. Whatever transaction undertaken by the plaintiff is strictly a private arrangement between him and the first defendant, to which the third defendant is not privy to.

As all the alleged particulars of fraud have been sufficiently dealt with by way of affidavit evidence, I see no reason to accede to the plaintiff's plea that he be given a chance to prove fraud against the third defendant by any of oral evidence.

A number of authorities were cited by the plaintiff to establish that equities can defeat a charge, two of these being *Public Finance Bhd. v. Narayanasamy* [1971] 2 MLJ 32 and *Kheng Soon Finance Bhd. v. M.K. Retnam Holdings Sdn. Bhd. & Ors.* [1983] 2 MLJ 384. These two cases can be distinguished in that the sale and purchase agreements relating to the different properties in the two cases were executed first before the same parties were charged and under those circumstances, the rights acquired under the sale and purchase agreements cannot be altogether brushed aside.

The facts of the case before me are in the reverse in that the charge was created first and then came the sale and purchase agreement. There is no denying the fact that the plaintiff had acquired a beneficial and an equitable interest over his lot but this is however subject to the prior right of the third defendant.

The plaintiff's allegations of fraud may well be founded against the first defendant with whom he had entered into an agreement and the fact that he has not been supplied with a copy of the sale and purchase agreement, tends to show that there may well have been some sharp practices to which the third defendant was not a party.

As the chargee of the property, the third defendant has an indefeasible title under s. 304 of the National Land Code and in the absence of fraud, no one can challenge its rights to exercise its power to auction the property to satisfy the amount due to it from the chargor, the second defendant and to that extent, I had allowed the application in terms prayed for by the third defendant.

Also found at [1987] 2 CLJ 52